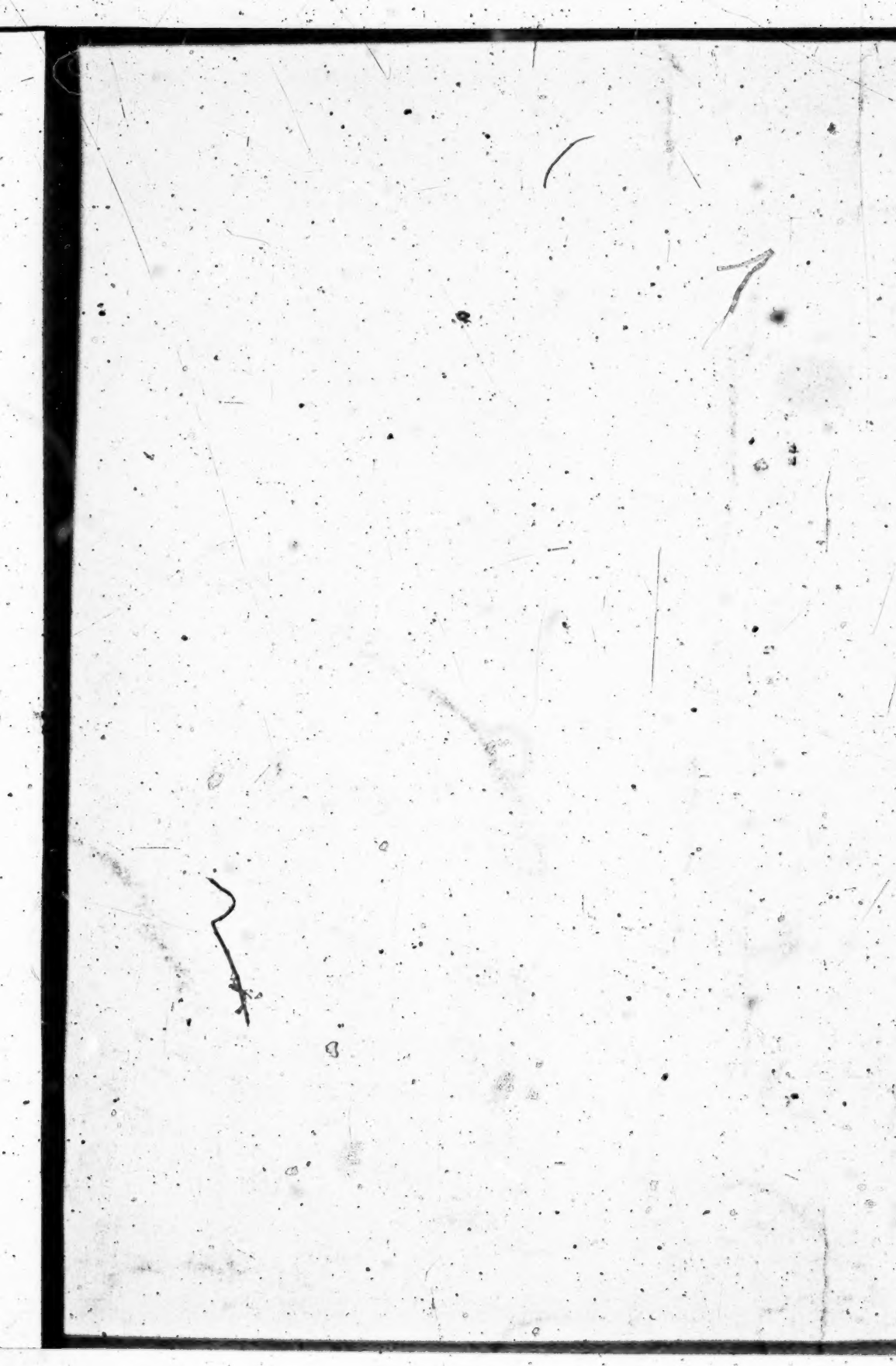

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No. 442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

MARVIN K. SWOFFORD; MARION F. WRIGHT; AND ESSEX CORPORATION, D/B/A THE PATHFINDER COMPANY,
Petitioners,

v.

B & W, INC.
(And Reverse Title),
Respondent.

PETITIONERS' RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAYDEN, PRAVEL, WILSON & MATTHEWS

JACK W. HAYDEN
Suite 1111
500 Jefferson Building
Houston, Texas 77002
713-CA-2-1347

Attorneys for Petitioners
MARVIN K. SWOFFORD; MARION F. WRIGHT; AND ESSEX CORPORATION, D/B/A THE PATHFINDER COMPANY

FIDELITY PRINTING COMPANY, INC., HOUSTON

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Respondent challenges the Court's jurisdiction on the basis that Petitioners' Writ of Certiorari was untimely filed.

In response to that challenge Petitioners would respectfully refer the Court to the Supplemental Transcript of Record filed herewith which contains Petitioners' "Motion to Extend Time in Which to File Petition for Rehearing and the Court's Order extending the time until July 11, 1968.

ARGUMENT REGARDING JURISDICTION

Petitioners respectfully suggest that the time for filing their Writ of Certiorari was tolled by the Court's granting of Petitioners' Motion to Extend the Time for Filing a Motion for Rehearing.

The judgment of the Court of Appeals in this action was entered May 22, 1968 (R.841).

On June 4, 1968, the Court of Appeals granted Petitioners' Motion to Extend the Time in Which to File a Motion for Rehearing and extended such time to and including July 11, 1968. Thus, the Court of Appeals in effect suspended the finality of its Judgment and thus tolled the running of the ninety (90) day period for filing the Writ of Certiorari under 28 USC 2101(c).

As this Court said in *Department of Banking, State of Nebraska* v. *Pink*, 317 US 264, 63 S.Ct. 233 (1942) Reh. Den. 318 U.S. 801, 63 S.Ct. 850:

> A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment . . .

The court went on to explain what *finality* of the lower court's judgment is required for review by the Supreme Court:

> For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Court, 278 U.S. 575, 49 S.Ct. 94, 73 L.Ed. 515; Cheltenham & Abbington Sewerage Company v. Pennsylvania Public Utility Commission, 317 U.S. 588, 63 S.Ct. 38, 87 L.Ed ....., decided October 12, 1942), but rather whether the record shows that the order of the appellate court has in fact fully ad-

judicated rights and *that adjudication is not subject to further review by a state court.* (Emphasis Added)

Thus, it is submitted that the entry by the Court of Appeals of its order extending the time for filing a Motion for Rehearing operated to suspend the finality of the judgment of the Court of Appeals from June 4, 1968, the date of entry of the Order to and including July 11, 1968, a period of some thirty-eight days.

By excluding these thirty-eight days from the ninety (90) days specified in 28 USC 2101(c) for applying for review by the Supreme Court, it will be seen that the Petition for Writ of Certiorari filed August 26, 1968, was well within the prescribed period.

There is no provision for tolling the ninety day period under 28 USC 2101(c) in the Judicial Code. Apparently, it is done in *Department of Banking, State of Nebraska* v. *Pink,* supra, by judicial fiat. If the mere filing of a petition for rehearing tolls the period, then the filing of a motion to extend the time for filing a motion for rehearing should toll the ninety day period as well. Otherwise the Judicial Code, should be dispensed with so that Petitioners may recognize that truly in fact it is ignored, or overlooked when convenient.

Certainly, the Fifth Circuit Court of Appeals treats a motion to extend the time in which to file a petition for rehearing the same as a motion for rehearing in so far as both automatically stay the mandate. (See letter, Appendix p. 1a) If both types of motion are treated the same for one purpose, they should be treated the same for all purposes.

In all fairness, it must be recognized that otherwise a litigant is faced with unwritten rules.

CONCLUSION

For the foregoing reasons it is submitted that this Court has jurisdiction of this action under 28 USC 2101(c).

Respectfully submitted,

HAYDEN, PRAVEL, WILSON & MATTHEWS

By: .....
Jack W. Hayden
Attorneys for Petitioners

CERTIFICATE OF SERVICE

Service of Petitioners' Response to Respondent's Brief in Opposition to Petition for Writ of Certiorari has been made on Respondent by mailing, postage prepaid, to the following:

R. DOUGLAS
LYON & LYON
811 West Seventh Street
Los Angeles, California 90017

TOM ARNOLD
ARNOLD, ROYLANCE, KRUGER & DURKEE
2220 Tennessee Building
Houston, Texas 77002

on this 30 day of September, 1968.

.....
Attorney for Petitioners

APPENDIX

United States Court of Appeals

FIFTH CIRCUIT

WARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408-400 ROYAL ST.
NEW ORLEANS, LA. 70130

June 7, 1968

Mr. Jack W. Hayden
Attorney at Law
Suite 1111
Five Hundred Jefferson Bldg.
Houston, Texas 77002

Dear Sir:

Re: No. 23861 - Marvin K. Swofford, et al, etc. -vs- B & W, Inc. (And Reverse Title)

I return herewith your motion for stay of mandate this day received, along with your letter of June 6, 1968 in the above cause, as same is not necessary at this time.

Since this Court has granted appellants an extension of time to and including July 11, 1968 in which to file a petition for rehearing, this Court's mandate in this cause is automatically stayed until that time, or until seven (7) days after this Court's possible denial of said petition for rehearing.

If you will again forward this motion for stay of mandate within seven (7) days from the denial of said petition for rehearing, it will be submitted to this Court for an immediate ruling.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By R. E. Windhorst, Jr.
Deputy Clerk

REWjr:adg